IN THE

Supreme Court of the United States

OCTOBER TERM, 1939

UNITED STATES OF AMERICA ..... *Petitioner,*

v. No. 72.

MRS. JULIA CAROLINE SONENBARGER, ET AL. *Respondents.*

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SUPPLEMENTAL BRIEF FOR RESPONDENTS

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SUBJECT INDEX

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ERRATA IN MAIN BRIEF

Wherever occurring in the Subject Index the word "Appellant," should be *Respondent;* and the word "Appellee" should be *Petitioner.*

In the Circuit Court of Appeals the petitioner in this Court was the appellee; and the respondents in this Court were the appellants.

ARGUMENT

Of necessity, caused by the delayed filing of petitioner's Brief, the respondents prepared and printed their main Brief in this case before seeing either of petitioner's briefs. It was assumed that, notwithstanding different attorneys in this Court, petitioner would rely upon the same arguments advanced in the Circuit Court of Appeals. It now appears that with each change of attorneys petitioner shifts its defense tactics. Respondents therefore crave the indulgence of the Court in presenting this their Supplemental Brief.

A careful study of petitioner's briefs in this Court now indicates that petitioner's present defense contentions may be summarized as follows:

1. The Boeuf Floodway was never constructed, and the fuse-plug levee at its head does not exist.

2. The non-existent Boeuf Floodway, and its fuse-plug levee, have now been abandoned.

3. Respondent's land is now *better protected* than before the 1928 Act: because, (a) the *levees on the south bank of the Arkansas River* have been strengthened, independently of the 1928 Act, and (b) the experimental *cut-off program* initiated after 1932 has decreased flood hazards, and (c) the authorizations of the 1936 and 1938 Acts for (1) works on the lower river and (2) reservoirs *may*, when completed, further decrease flood hazards to respondent's land.

Petitioner undertakes to support these three assaults on the constitutional rights of the respondent by the oriental method of argumentation with endless repetition. Its attor-

neys seek to induce hypnotic acquiescence by the simple formula of monotonous re-assertion.

With subtle naivete, the indisputable physical facts and unquestionable public records, to say nothing of the uncontradicted record evidence before the Court, all presented by our main brief, are of necessity ignored.

The initial and fundamental issue to be determined is shall this Court now reverse the heretofore well-established principle that the Fifth Amendment requires that just compensation shall be paid *as of the time of the taking*, and is equivalent to "*the market value of the property at the time of the taking contemporaneously paid in money.*" *Olson* v. *United States*, 292 U. S. 246; 54 S. Ct. 704, 78 L. ed. 1236, at p. 1244. Unless the Court now departs from this decisive principle, then all of the speculative discussion of petitioner as to the possible effect of cut-offs, reservoirs, and suggested possibilities of future modifications of plans as authorized by the Acts of 1936 and 1938 are entirely irrelevant, and cannot be considered. This constitutional principle of just compensation *at the time of taking* leaves petitioner without substantial defense. All of the matters which they urge as possible mitigation of damages, and in support of their plea of "Added Protection," were developments long years after respondent's property had been taken, and her loss had been sustained.

I.

Petitioner continues to reiterate its ungrounded assertion that "*the Boeuf Floodway was never commenced*" (Br. 50), and that "*no fuse plug exists*" (Br. 17).

This erroneous premise is completely refuted by the record in this case presented in Point III of our main brief.

This contention of petitioner must indeed be startling news to the Chief of Engineers, who as long ago as January, 1936, assured the Congress that the flood control construction work authorized by the Act of May 15, 1928, was essentially complete (R. 147-148; Hearings Senate Commerce Committee on S. 3531, January 27, 1936, pp. 59-52). The impossible burden of the vast and difficult problem of Mississippi River flood control to which petitioner refers (Br. 14) has, in the judgment of the Army Engineers, been practically solved (see quotations Point III of main brief).

The Mississippi River recognizes only physical facts. Petitioner frankly discounts the force of the actual existence of the fuse plug levee as "a physical fact" (Br. 17-18, 54). Admittedly, as a physical fact, pursuant to the Flood Control Act of May 15, 1928, the levees on the east bank of the Mississippi River, and the levees north and south of the presently existing fuse plug on the west bank of the Mississippi, have long since been raised and strengthened to such an extent that the fuse plug levee must, of physical necessity, discharge all water from the main channel in excess of the safe carrying capacity of the river before any other levees are seriously endangered. These physical facts *create* the fuse plug levee, and protect the balance of the levee system from destruction, sacrificing the Boeuf Basin for the protection of the rest of the alluvial valley.

Petitioner undertakes to justify its anomalous assumption by asserting: "Until the *guide levees* are completed, there is no purpose to have the floodwaters go over the fuse plug" (Br. 54). On the contrary, since 1931 the suc-

cessive Chiefs of Engineers have assured the Congress that "these levees (guide levees) are *not essential to the proper functioning of the plan*" (Doc. 798, pp. 26, 47; R. 138, 139); and as late as March 22, 1939, the Jadwin Plan was still actually operating *"true to its design"* (main brief p. 67). Counsel simply ignore the unquestionable record—a physical fact which has constantly confronted and menaced every inhabitant of Boeuf Basin for the last seven years.

With frank inconsistency, petitioner finally assures the Court that, after all, the building of the proposed guide levees would be wholly immaterial to respondent's cause of action, because even the building of such guide levees to protect other areas would not amount to a taking of respondent's land, nor create any cause of action (Br. p. 51, note 26).

II.

The second basic unrealized premise from which petitioner concludes there is no liability in this case is its unsupportable assertion that the Boeuf Floodway has been abandoned. This argument also disregards the physical fact of the existing fuse-plug levee, which would remain as a fuse-plug even under the proposed Markham Plan of the 1936 Act which suggests the possibility of shifting the proposed guide levees into the Eudora Floodway, but leaves respondent's land in the floodway under either plan.

The fallacy of this hypothesis is made manifest by the cumulative record in the case at bar presented in Point VI of our main brief.

Furthermore, petitioner now reduces its argument to absurdity by demonstrating, to its satisfaction, that in con-

trolling the floods of the Mississippi River the United States can *never* be guilty of taking private property for public use, because: "There will, therefore, invariably be constant changes in flood-control plans" (Br. 14). Petitioner frankly confesses in its Supplemental Brief: "Congress does not contemplate immediate construction of the Eudora floodway"; and adds impressively "flood-control plans for the Mississippi shift their course fully as rapidly as does the river, and it is *by no means certain that construction will ever be commenced*" (Br. 20). Counsel amplify their position by again stating: "There will, in other words, always be changes and improvements. No man has yet dared to assert that *the* plan for Mississippi flood control has been found—the plan which cannot be improved and will not be modified" (Br. 25). And finally petitioner submits: "The scope of respondent's claim may best be illustrated by supposing the not improbable contingency of another change in flood-control plans for the Tensas Basin. *If* the Government were to decide, on the experience of the last decade, that the straightening and deepening of the channel between the Arkansas and Red Rivers was itself sufficient protection, it is *not unlikely* that the Cypress Creek fuse-plug *would be* raised to the height of the other levees" (Br. 31). (Italics supplied.)

In other words, *the Constitution requires* that respondent recover in this action "the market value of the property *at the time of the taking* contemporaneously paid in money." *Olson* v. *United States, supra. Petitioner argues, No.* She must first wait for eight (8) years (1928 to 1936) to see if science and experience cannot collaborate to devise some new method by which a portion of the market value of her property may be restored; and then she must further

wait until the Congress of the United States authorizes an attempt to accomplish that desirable result; but, that attempt having failed, she must now wait *indefinitely* and *forever* before asserting liability because, perchance, "no man has yet dared to assert that *the* plan for Mississippi flood control has been found" and "Congress must have freedom to make the necessary changes"—until such time as respondent and her generation have passed into the shades of eternal disappointment and oblivion.

If petitioner's argument on this point be sound, we frankly confess there can never be "a taking" of respondent's property requiring constitutional compensation, because there will forever be a possibility of change, even in the congressional mind.

The suggestion that the fuse-plug levee *may* some day be raised three feet to the grade and section of all other levees in the alluvial valley, thus restoring to respondent the equal protection of which the 1928 Act deprived her, is especially unfair to respondent and unfortunate for petitioner. It is absolutely true that the Boeuf Floodway, as a physical fact, can never be abandoned until that is done. Only such raising and strengthening of the levee can destroy its present existence as a fuse-plug. Only the actual destruction of the fuse-plug by giving it the strength and grade of all other Government main stem levees can satisfactorily end all of the futile conjecture as to the future in which petitioner now indulges.

But, every effort to induce the Congress to so raise the fuse-plug levee, and to thus abandon this floodway, has met with instant and vehement opposition by the Army Engineers and has been promptly rejected by the Con-

gress. As early as 1934 bills were introduced for this purpose (H. R. 8146 and H. R. 8048). In the Hearings of February 27, 1934, on these bills the Chief of Engineers emphatically advised the Congress: "Emphasizing my sympathy, and I feel very kindly with the people certainly in these two basins, I still would think *it would be courting disaster to raise the fuse-plug levee* until the matter is really settled. I do not know what would happen if you let two and a quarter million feet go past the fuse-plug" (p. 28; R. 141).

And *so has it ever been until the present moment.*

Even if the fuse-plug levee should ever be built up equal in grade and strength to the adjoining and opposite levees, thus actually abandoning the floodway behind it, respondent, if still alive, would not thereby be compensated for the market value of her private property taken for public use more than ten years ago. She bought this property in good faith in 1927 for $125 per acre. For the past *ten years* it has been without substantial market value *solely* because it was "taken" and dedicated by her sovereign Government for the benefit of the Nation. Nothing short of judgment in this case can, in the constitutional sense, restore that loss already sustained so long ago.

Of course the Court will bear in mind that petitioner's entire speculative discussion of the modification of the Jadwin Plan by the Flood Control Act of June 15, 1936, is wholly academic in so far as it affects respondent's land. The substitution of the Eudora Floodway for the Boeuf Floodway would affect large areas west and southwest of respondent's land (most of the present Boeuf Floodway), but it would bring *no relief to respondent* because her land

is in *either* floodway *behind the same, identical fuse plug levee.*

III.

"Added Protection" to respondent's lands? A. Generally.

The final, fanciful premise proffered by petitioner is its belated, much-reiterated assertion that: "The *lands in the Boeuf Floodway now have more flood protection than they have ever before received.* In the event of a sufficiently severe flood her lands are almost certain to be flooded, but this was the case before" (Br. 13). "The land is subject to no additional flood danger; indeed, it is better protected than ever before" (Br. 30-31).

The first reaction to this startling assertion is to exclaim: "Then why ever a floodway at all! Has this entire *'floodway'* program been only a cruel and expensive hoax for the past ten years?"

Of course it is not claimed that this was true at the time respondent's property was taken, nor when her suit was filed, when she should have been paid the then market value of her property, contemporaneously with the taking. *Olson* v. *United States, supra.*

In the three trials of this case (D. C., C.C.A. and here), the petitioner has changed its attorneys and shifted its defensive positions with facility equal to that with which it asserts it is necessary to constantly shift the flood-control plans of the Mississippi River. Judging from the incessant repetition of its allegation of "better protection," obviously reliance is now finally placed on this charge in this court of last resort.

This sophistry is really a new issue not made by the pleadings in the case (R. 18-21, 77-80).

The very assiduity with which counsel here harp upon this belated fiction, happily repeating the seductive asseveration at every possible opportunity throughout their briefs, arouses just suspicion. It is a well-known mental law that one finally comes to believe whatever he repeats to himself for a sufficient length of time, *whether the statement be true or false.* The constantly reiterated false suggestion is eventually accepted as truth. Moreover, it is ultimately *believed* to be true. Hence the doubtless presently sincere enthusiasm of petitioner's counsel.

Our entire main brief completely refutes this final stand of the petitioner. Every *fact* in the record shouts disagreement. The very purpose of the Jadwin Plan as a whole is to the contrary. To say that confining the 500,000 c.s.f. of water that flooded the State of Mississippi in 1927, plus all the other vast volumes of water that escaped elsewhere from the main stem of the river, and artificially diverting this multiplied-Niagara torrent against and through the fuse-plug levee over respondent's land—to say that such a plan and result gives respondent's land "added protection" is, we submit, absurd on the face of it. To us who live behind that fuse-plug it is tragically false. No dweller in the alluvial valley, familiar with the actual physical facts, would so contend. One must dwell in an atmosphere of security, far from the scene of actual danger, to work out any such theory.

The respondent has not been relieved by any such groundless hallucination. There are no buyers for her condemned property.

The Chief of Engineers is not deluded by any such futile hope. He conscientiously recommends that the United States pay for flowage rights over the floodway property from 75 per cent to 80 per cent of the real value of that property as representing just compensation for *values actually destroyed* (Hearings on S. 3531, Senate Commerce Committee, January 27, 1936, at p. 38).

The Congress of the United States labors under no such misconception. It emphasizes the falsity of any such supposition by authorizing the payment of $20,000,000 for 75 per cent of these necessary floodway flowage rights as just compensation for destroyed values. See sec. 12 of Act of June 15, 1936, 49 Stat. 1508.

The President of the Mississippi River Commission observes: "Fundamentally, the difficulty down through the Delta and the valley is the fear of a flood. The actual damage from a flood is almost insignificant compared with *the fear of a flood.* Now, *that is ever present,* and we should get a real solution. * * * But the *development cannot proceed,* in comparison with the rest of the United States, so long as the situation is such that any man of average intelligence cannot go and look at the results and *know* that we will never have a flood menace again" (Hearings on S. 3531, Senate Commerce Committee, January 27, 1936, at p. 74).

Common sense, with a look at the map, refutes any such erroneous argument of "better protection" by the mere physical facts involved. The Boeuf Floodway property is deliberately sacrificed for the explicit purpose of protecting the balance of the alluvial valley. How could the diversion of a violent, destructive flood, several times the

volume of Niagara Falls, over a fast-land, agriculturally-developed, countryside give that area "better protection"!

To support its theoretical delusion petitioner repeatedly recalls that respondent's land was flooded in 1912, 1913, 1919, 1921, 1922 and 1927; and that it has not once been flooded since 1928. The explanation is simple.

Petitioner disregards the undisputed record fact that prior to 1922 there was a gap in the levee at the point where Cypress Creek emptied into the Mississippi River. All of the surface flood water of the Cypress Creek watershed went into the Mississippi River through this gap. Hence, whenever the Mississippi River rose above its natural banks the water flowed through this outlet at the mouth of Cypress Creek and ran south behind the main stem levee. For many years the property owners in this area, including the respondent, had been annually taxing themselves and bonding their property for the purpose of constructing a flood-proof levee from the Arkansas state line on the south up the south bank of the Arkansas River to the head of the Mississippi River back-water area on the north. The individual levee districts which had done this work for a generation were finally merged into a local organization called the Southeast Arkansas Levee District, covering the entire area. Everybody knew that the work could not be finally effective until the gap at the mouth of Cypress Creek was closed; but this gap could not be closed until a new, gigantic drainage system could be constructed inland to take care of these surface waters that for ages had been flowing naturally through Cypress Creek into the Mississippi River. This drainage work was done at enormous expense, with great bonded indebtedness, by the local property owners

organized under the name of the Cypress Creek Drainage District.

When this drainage system was finally ready to function in the year 1921 the gap in the main stem levee at the mouth of Cypress Creek was then closed, and the property owners were assured by the United States Chief of Engineers of complete flood protection thereafter from the Mississippi River flood waters. His assurance is justified because since the gap was closed and the levee was thus completed along the main stem of the Mississippi River in 1921, that levee (now taken by the United States as a fuse-plug levee), has in fact never failed, or been breached. Therefore, no one was excited when flood waters from the Mississippi River in the years mentioned by petitioner came through the outlet in the gap of the levee at the mouth of Cypress Creek, because everyone could see the work of levee building rapidly progressing and *knew* that the time was almost at hand when this gap would be closed, and flood protection would be complete. For this reason, and because of this assurance, market values for land in this area were constantly increasing during the very years that petitioner reminds the court water was escaping naturally from the Mississippi River and slightly inundating some of the inland area.

Of course petitioner stresses the flood of 1927 which inundated respondent's land to a depth of 20 feet. So also was all of the county seat at Arkansas City then under 20 feet of water. So also was all of the green area shown on the maps before the Court inundated in 1927, thousands upon thousands of acres of land, villages, towns, railroad lines, highways, industries and all the other indicia of a highly developed civilization there found. But petitioner

admits that the flood of 1927 was "*unprecedented*" (Br. 4). Surely even petitioner cannot claim that all of the vast area of land flooded in 1927 is a natural flood bed of the Mississippi River, and is forever subject to a servitude for all future floodings by the United States. If so, what becomes of the vast, highly developed, rich Delta area of the State of Mississippi?

Of course the Court will not forget that the 1927 flood in the Boeuf Basin area came from breaches in the levees on the south bank of the *Arkansas* River which had not then been completed; but even petitioner admits that these levees on the south bank of the Arkansas River, pursuant to the program on which the local interests had been assiduously working for years, *independent of the 1928 Act* (Br. 9, 48, 49, Note 25), were restored and *completed* shortly after the 1927 flood. *Therefore,* the local property owners had reached the consummation of their fight for complete flood protection against water from both the Arkansas River and the main stem of the Mississippi River, and knew that levees elsewhere (as in the State of Mississippi) would break for their future protection; when suddenly, without warning, like a murderous bolt from the blue, the fruit of their labor, and the result of their enormous expenditures, was practically destroyed by the passage of the Flood Control Act of May 15, 1928, which took their reclaimed and protected lands for a national floodway. The simple truth is that respondent's land had been reclaimed and protected by voluntary *taxation* when it was deliberately destroyed by involuntary *legislation.*

Petitioner also repeatedly insists that there have been the "*three great floods*" of 1929, 1935, and 1937, since the

passage of the Flood Control Act of 1928, and respondent's land has not once been flooded (Br. 11, 13, 32, etc.).

Again great distance and utter unfamiliarity with local conditions doubtless accounts for petitioner's error. For the property owners south of the mouth of the Arkansas River there has been *no great flood* since 1928. There can *never* be a "great flood" for this area until a flood of approximately 2,000,000 c.s.f. comes down from the upper Mississippi River to the mouth of the Arkansas River *at a time when the Arkansas and White Rivers are also contemporaneously discharging their own flood into the main stem of the Mississippi River.* This condition has not occurred since 1928. The so-called floods of 1929 and 1935 were not noticed at all in this area *south of the mouth of the Arkansas River* where respondent lives. Even the greatest of the floods mentioned by petitioner, that of 1937, aroused no anxiety in this area because long before the crest of the Ohio River flood reached the mouth of the Arkansas River it was noted by all concerned that, thanks to a Gracious Providence, both the Arkansas and White River watersheds were practically dry, and the enormous back-water storage area of approximately 1,200 square miles at the mouths of the White and Arkansas Rivers was practically empty. Hence, every property owner below the mouth of the Arkansas River knew (1st) that when the 2,000,000 c.s.f. flood from the Ohio valley did reach the mouth of the Arkansas River it could, and would, be safely carried past the fuse-plug levee as petitioner alleges; and they also knew (2nd) that when this Ohio River flood reached the mouth of the Arkansas River a large portion of it would be absorbed by the empty storage basin constituting the entire backwater area at the mouth of the White and Arkansas Rivers, thus

completely eliminating all possible danger to the fuse-plug levee. And so it was.

But these same property owners know just as surely that whenever any flood of approximately 2,000,000 c.s.f. comes out of the upper Mississippi River, or any of its great tributaries, to the mouth of the Arkansas River at a time when the Arkansas and White Rivers are *also* in flood stage, *the fuse-plug levee must go out* and the spillway at the head of Boeuf Basin will function *as designed by law.*

"Added Protection" to respondent's land? B. Specifically.

Whence cometh this "Added Protection"? HOW is respondent's land better protected?

Petitioner asserts that respondent's land is *now* (in 1939, ten years after its taking) "better protected" (1st) "by the strengthening of the levees on the south bank of the Arkansas River" (Br. 30, 48); and (2nd) "by the construction of cut-offs" (Br. 30, 48); and (3rd) by (a) recent works on the Lower River and (b) the proposed Reservoirs authorized by the Acts of 1936 and 1938 (petitioner's Supplemental Brief).

Each of these alleged reasons for "better protection" quickly disappear when carefully examined and considered.

1. *Arkansas River levees.* As hereinbefore shown, this protection was *already assured* prior to the passage of the 1928 Act, and independent of it. This protection was largely the result of efforts on the part of the local property owners extending over a long period of time. By the Flood Control Act of May 15, 1928, the United States has now rendered those Herculean efforts futile in so far as respon-

dent's land is concerned by the simple expediency of gathering this destructive Arkansas River flood-water into the main stem of the Mississippi River only to be immediately thereafter hurled through a fuse-plug levee directly over respondent's property. Wherein then lies the alleged *"benefit"* to this property?

2. *Cut-offs.* This alleged "benefit" is thoroughly disposed of by the Record as presented in Point VII of our main brief.

Petitioner now frankly admits in its Supplemental Brief that: "The Jadwin Report *unequivocally rejects* this alternative (cut-offs) as too uncertain, because of the fear of the increased velocity of the water and the possibility that new bends will be formed." How then can any possible alleged benefits from cut-offs be considered in this case when the idea of trying them originated long after respondent's property had been taken and after the present fuse-plug levee was actually in an operative condition to function as designed—that is to say, after 1932—whereas the Constitution requires that respondent should have received as her just compensation the full market value of her property *"at the time of the taking* contemporaneously paid in money." *Olson* v. *United States, supra.*

When the chairman of the Senate Subcommittee of the Commerce Committee (Senator Overton) in 1936 asked the President of the Mississippi River Commission, "the father of the cut-offs," if cut-offs are *"safe as a substitute for a floodway* such as the proposed Eudora floodway," General Ferguson emphatically replied: *"No, sir; you can't say that"* (Hearings, Senate Commerce Committee on S. 3531, January 27, 1936, at p. 78).

The Chief of Engineers in Document No. 2, 74th Congress, 1st session, called to the attention of the Committee on Flood Control of the House of Representatives that: "Cut-offs being made at the Greenville Bends in the neighborhood of Greenville and Arkansas City *should* result in a lowering of the flood stages in that locality, but *will not lower the flood stages below the cut-offs. The definite effect of these cut-offs on flood stages cannot yet be determined.*" (p. 3.) And so it is until this moment.

3. *Authorizations of the 1936 and 1938 Acts.*

(a) Works on the Lower River. In its Supplemental Brief petitioner speculates as to what *may* be the effect of work now in progress on the lower river some *600 miles below respondent's land.* The most casual consideration of the flood control *map* of the entire Jadwin Plan as prepared by the Army Engineers will eliminate this curious suggestion from further consideration. The physical conditions which destroy the market value of respondent's property lie *upstream* from the latitude of her land in the Government's flood control works which gather all of the surface water from the enormous watersheds of the Ohio River and its tributaries, the upper Mississippi River and its tributaries, the Missouri River and its tributaries, the White River and its tributaries, and the Arkansas River and its tributaries (R. 391), and designedly spills over the fuse-plug levee in front of respondent's property *all* of this enormous volume of water in excess of the safe carrying capacity of the levees below (which is approximately 2,000,000 c.s.f.), in order to protect the lower river levees and the enormous important areas of property protected thereby.

After respondent's property has been utterly destroyed by the breach of the fuse-plug levee, it is of little consolation

to her what the Government may do to further protect property owners 600 miles *downstream* from her. How can anything which the Government may do with the flood waters many days after they have destroyed and left respondent's property be of benefit to her land? When these flood waters finally reach the flood control works in the lower river to which petitioner refers their disposition there can be of little concern to respondent, and of *no relief* to her land already destroyed.

But again, this is not left as a matter for indecisive argument. The point has been officially disposed of by the President of the Mississippi River Commission. In the Hearings of January 27, 1936 (Senate Commerce Committee on S. 3531), Senator Overton expressly asked if these recommended works on the lower section of the river, *when completed*, would dispense with the necessity of having a Eudora Floodway for the escape of waters from the Mississippi River. General Ferguson unequivocally answered: "*You would require a floodway.*" (pp. 75-76.)

(b) *Reservoirs.* Of course there is nothing in the Record in this case about reservoirs because the case was tried in the lower court a year before Congress authorized the modest beginning of a program of reservoirs.

None of these dream reservoirs have yet been constructed. Funds for their construction are not available. Appropriations to *begin* an insignificant number of them have been authorized. War, or one year's national elections, can speedily "liquidate" the entire idea.

Petitioner unreservedly admits in its Supplemental Brief that no such relief was contemplated at the time respondent's property was taken. It truthfully states: "The

Jadwin Report rejected this alternative as too speculative unless developed for the local benefits of *local* flood protection, water storage and power projects."

When the Congress was being urged to authorize the construction of only 26 reservoirs in the Arkansas and White River basins, the Chief of Engineers, in an adverse report on May 15, 1935, reminded Congress that: "These reservoirs cannot be relied on to prevent a flood which will overtop the levees *unless a relief outlet is provided*" (Document No. 2, House Committee on Flood Control, 74th Congress, 1st Session, p. 3.)

In response to a request of the House Flood Control Committee for a report on a series of reservoirs which would "abrogate the necessity of fuse-plug levees and diversions from the main channel of the Mississippi River," on May 15, 1935, the Chief of Engineers replied: "The report indicates therefore that the costly system of reservoirs under study *would not abrogate the necessity for fuse-plug levees or similar works, and diversions from the main channel of the Mississippi River* to afford assured protection against extreme floods." (House Flood Control Committee Document No. 3, 74th Congress, 1st session; p. 2.)

On January 27, 1936 (Hearings, Senate Commerce Committee on S. 3531), the Chief of Engineers stated: "There is no means that we know about of holding any such amount of water, except and *unless the United States would take up reservoirs throughout the entire country and, for the single purpose of withholding water, expend about $1,260,000,000*" (p. 37). "I repeat that if we are to get this river under control, it is by this class of control: by building the *levees* and by the plan of taking out this water by means

of *spillways*, or if you get *reservoirs* from year to year, bearing in mind that *it is rather unthinkable that you would have a big proportion of them in less than 20 or 30 or more years.* I would say to this committee what I said to the House committee: '*You must regard your reservoirs, as far as control is concerned, as just* so much *fat*' " (p. 39).

In referring to reservoirs as "just so much fat," more commonly referred to as political "pork," the Chief of Engineers did not foresee the possibility of the further use of non-existent reservoirs as an argument before the Supreme Court in this case in 1939.

The respondent and her attorneys will long since have lost all interest in earthly floods, private property, and constitutional guarantees before any completed reservoir system lends any additional degree of safety to the Government controlled fuse-plug levee which destroyed property values in the Boeuf Floodway in the year 1929.

CONCLUSION

If respondent had received just compensation for her private property at the time of its taking contemporaneously paid in money as required by the Constitution (*Olson* v. *United States, supra*), this Court would not now be confronted with the voluminous briefs in this case dealing with any of these irrelevant, recent proposals on which petitioner relies to avoid judgment. The constitutional requirement of just compensation, and the express congressional mandate that the United States shall provide flowage rights for this diversion of destructive flood waters

from the main channel of the Mississippi River over respondent's land, cannot be so easily evaded.

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